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EXAMINER	
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1619	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/586,100	VENTURA ET AL.	
	Examiner	Art Unit	
	Christopher R. Lea	1619	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *08 August 2008*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-4,8-19,21-25,28-31 and 33* is/are pending in the application.

4a) Of the above claim(s) *4,18,19 and 21-23* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-3,8-17,24,25,28-31 and 33* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *6/29/2007*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

. This application is a 371 (national stage application) of PCT/US05/03462 which claims benefit to US Provisional application 60/540,176.

Claims 1-4, 8-19, 21-25, 28-31, & 33 are pending. Claims 1-3, 8-17, 24, 25, 28-31, & 33 are currently under examination.

Election/Restrictions

1. Applicant's election with traverse of Group I, claims 1-4, 8-17, 24, 25, 28-31, & 33, in the reply filed on August 8, 2008, is acknowledged. The traversal is on the ground(s) that examiner has failed to adequately support an asserted lack of unity. This is not found persuasive because the cited art does anticipate the claim.

Lorenz et al. disclose a free-flowing powdery (anhydrous) composition that contains vegetable oils (water-dispersible, self-emulsifying fatty acid-derived conditioners) and peroxide salts (column 1 line 46 through column 2 line 11). Lorenz et al disclose mixing the composition with a solution of hydrogen peroxide (an aqueous medium) and applying the mixture to the hair (column 2, line 27-33). Though Lorenz et al. do not identify this mixture as an emulsion, the conclusion that it is an emulsion is inescapable since water, oil (self-emulsifying no less), and an emulsifying surfactant are present in the mixture. As such, all limitations of claim 1 are met by Lorenz et al. and the claim is anticipated. Since the claim is anticipated, unity is lacking for the reasons cited in the previous restriction requirement.

The requirement is still deemed proper and is therefore made FINAL.

2. Claims 18, 19, & 21-23 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on August 8, 2008.

3. Applicant's election without traverse of the combination of caprylic/capric triglyceride, glyceryl cocoate/citrate/lactate, and PEG-40 sorbitan oleate as the self-emulsifying fatty acid-derived conditioner in the reply filed on August 8, 2008, is acknowledged.

4. Claim 4 is withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on August 8, 2008.

Information Disclosure Statement

5. The information disclosure statement (IDS) submitted on June 29, 2007, was filed before the mailing date of the first office action on the merits. The submission is in compliance with the provisions of 37 CFR 1.97 & 1.98. Accordingly, the information disclosure statement is being considered by the examiner.

Claim Rejections - 35 USC § 112

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claims 1-3, 8-17, 24, 25, 28-31, & 33 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "substantially" in claim s 1 & 24 is a relative term which renders the claim indefinite. The term "substantially" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Claims 1 & 24 use "substantially" in conjunction with "immediately" thereby rendering the metes and bounds of this limitation unclear. What time frame is immediately, and at what point is that time frame no longer substantially immediately? Claim 1 also uses "substantially" in conjunction with "free-flowing" thereby rendering the metes and bounds of this limitation unclear. At what point is a composition no longer substantially free-flowing? Note that the use of "substantially" in conjunction with “anhydrous” is not indefinite since the term “substantially anhydrous” is defined in the specification. Since claims 2, 3, 8-15, 31 & 33 ultimately depend from claim 1 and claims 25 & 28-30 depend from claim 24, they have been rejected under 35 U.S.C. 112 second paragraph as well.

Claims 16 & 24 recite the limitation “… at least about …” which is indefinite. Either the limitation is “at least” or it is “about”. "At least" defines a static point, "about" is dynamic about a point. Since claim 17 depends from claim 16 and claims 25 & 28-30 depend from claim 24, they has been rejected under 35 U.S.C. 112 second paragraph as well.

Claim Rejections - 35 USC § 102

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

9. Claims 1 & 9 are rejected under 35 U.S.C. 102(b) as being anticipated by Lorenz et al. (US Patent 5,989,530).

Claim 1: Lorenz et al. disclose a free-flowing powdery (anhydrous) composition that contains vegetable oils (water-dispersible, self-emulsifying fatty acid-derived conditioners) and peroxide salts (column 1 line 46 through column 2 line 11). Lorenz et al. disclose the inclusion of polyethoxylated fatty alcohols in the composition which are among the water-dispersible, self-emulsifying fatty acid-derived conditioners in the instant specification (examples 2 & 3, column 2). Lorenz et al disclose mixing the composition with a solution of hydrogen peroxide (an aqueous medium) and applying the mixture to the hair (column 2, line 27-33). Though Lorenz et al. do not identify this mixture as an emulsion, the conclusion that it is an emulsion is inescapable since water, oil (self-emulsifying no less), and an emulsifying surfactant are present in the mixture.

Claim 9: Lorenz discloses the inclusion of potassium (an alkali metal) persulfate and ammonium persulfate in the composition (column 2, lines 8-11).

Claim Rejections - 35 USC § 103

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

11. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

12. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

13. Claims 1-3 & 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lorenz et al. (US Patent 5,989,530) in view of Cincotta et al. (US PreGrant Publication 2002/0155962).

Applicant claims

Applicant claims a substantially anhydrous, free-flowing composition for hair lightening containing a water-dispersible, self-emulsifying, fatty acid-derived hair conditioner and a peroxy salt compound.

Determination of the scope and content of the prior art (MPEP 2141.01)

Lorenz et al. teach, as a whole, a powdery hair bleaching (lightening) composition.

Since claims 2, 3, & 8 depend from claim 1, rejection of claim 1 under 35 USC 103 is also appropriate. Detailed discussion of the rejection of claim 1 and the teachings of Lorenz et al. appears above.

Ascertainment of the difference between the prior art and the claims (MPEP 2141.02)

The difference between Lorenz et al. and the instant claims is that Lorenz et al. do not expressly teach the claimed combination of hair conditioners. This deficiency in Lorenz et al. is cured by the teachings of Cincotta et al.

Cincotta et al. teach, as a whole, a non-aqueous (hence substantially anhydrous) composition to style hair which contains many optional hair conditioners (fixatives, humectants, emollients, etc.)

Claim 2, 3, & 8: Cincotta et al. teach a vast number of hair conditioners (as emollients) which may be included in combination in a hair active composition

(paragraph 47). Caprylic/capric triglyceride (a fatty ester, a C3-C4 polyol ester of a C6-C22 fatty acid), glyceryl citrate/lactate/linoleate/oleate (fatty esters, glyceryl ester of a C6-C22 fatty acid and at least one acid selected from the group consisting of citric, lactic, succinic acids), and PEG-40 sorbitan peroleate (a polyethoxylated C12-18 acylated sorbitol ester) are among the emollients taught (paragraph 47). The glyceryl cocoate/citrate/lactate part of the elected species is met by the glyceryl citrate/lactate/linoleate/oleate and glyceryl cocoate taught (paragraph 47, the "/" in these names is interpreted to mean a combination of the listed monoesters, as such the combination of citrate/lactate/linoleate/oleate and cocoate necessarily includes the combination of cocoate/citrate/lactate).

Finding of *prima facie* obviousness
Rationale and Motivation (MPEP 2142-2143)

It would have been prima facie obvious to one of ordinary skill in the art at the time the claimed invention was made to include the emollients (hair conditioners) of Cincotta et al. in the hair bleaching composition of Lorenz et al. to improve the appearance and condition of the hair and produce the instant invention. The skilled artisan would have been motivated to combine these teachings because both Lorenz et al. and Cincotta et al. teach anhydrous hair care compositions, one for bleaching and one for styling; therefore, the integration of their teachings to create one anhydrous composition capable of both bleaching and styling would have been obvious to the skilled artisan. Further, the teachings of Lorenz et al. and Cincotta et al. create a reasonable expectation of success.

14. Claims 1, 10-17, 24, 25, 28-31, & 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lorenz et al. (US Patent 5,989,530) in view of Syed et al. (US Patent 5,756,077).

15.

Applicant claims

Applicant claims a substantially anhydrous, free-flowing composition for hair lightening containing a water-dispersible, self-emulsifying, fatty acid-derived hair conditioner and a peroxy salt compound.

Determination of the scope and content of the prior art (MPEP 2141.01)

Lorenz et al. teach, as a whole, a powdery hair bleaching (lightening) composition.

Since claims 10-17, 24, 25, 28-31, & 33 ultimately depend from claim 1, rejection of claim 1 under 35 USC 103 is also appropriate. Detailed discussion of the rejection of claim 1 and the teachings of Lorenz et al. appears above.

Claim 16: Lorenz et al. disclose a free-flowing powdery (anhydrous) composition that contains vegetable oils (water-dispersible, self-emulsifying fatty acid-derived conditioners) and peroxide salts (column 1 line 46 through column 2 line 11, see claim 1 in 102 section), which is component (A) of the claim. Lorenz et al. disclose a solution of hydrogen peroxide (an aqueous medium, component (B) of the claim) which is mixed with the anhydrous free-flowing composition to form an emulsion (column 2, line 27-33).

Claim 24: Lorenz et al. disclose a free-flowing powdery (anhydrous) composition that contains vegetable oils (water-dispersible, self-emulsifying fatty acid-derived conditioners) and peroxide salts (column 1 line 46 through column 2 line 11, see claim 1 in 102 section), which is component (A) of the claim. Lorenz et al. disclose a solution of hydrogen peroxide (an aqueous medium, component (B) of the claim) which is mixed with the anhydrous free-flowing composition to form an emulsion (column 2, line 27-33).

Ascertainment of the difference between the prior art and the claims (MPEP 2141.02)

The difference between Lorenz et al. and the instant claims is that Lorenz et al. do not expressly teach the claimed hair protectants, additional system components, or kit. This deficiency in Lorenz et al. is cured by the teachings of Syed et al.

Syed et al. teach, as a whole, a method for protecting chemically treated hair and a kit for using the compositions to protect hair.

Claim 10: Syed et al. teach that compositions for protecting hair include polyols and cationic polymers (column 3, lines 35-39).

Claims 11-13: Syed et al. teach that compositions for protecting hair include starch hydrolysates and polysaccharides (column 3, lines 35-62). Though maltodextrin is not specifically disclosed, Syed et al. teach the HYSTAR®, a high molecular weight starch hydrolysate of undefined structure, which by its nature likely contains maltodextrin, a lower molecular weight starch hydrolysate of undefined structure, as a synthetic byproduct. ,.

Claims 14 & 15: Syed et al. teach including cationic polymers in the hair protectant composition, specifically MERQUAT 100 (column 6, lines 36-51) which is a tradename for the polymer polyquaternium-6.

Claim 16: Syed et al. teach including (in either component) a pH adjustor (column 7, lines 9-10). It would have been within the purview of the skilled artisan to optimize the pH for any desired purpose, specifically to an alkaline pH, where hair bleaching treatments containing hydrogen peroxide are more effective.

Claim 17: Syed et al. teach that compositions for protecting hair include polyols and cationic polymers (column 3, lines 35-39).

Claim 24: Syed et al. teach including (in either component) a pH adjustor (column 7, lines 9-10). It would have been within the purview of the skilled artisan to optimize the pH for any desired purpose, specifically to an alkaline pH, where hair bleaching treatments containing hydrogen peroxide are more effective.

Claim 25: Syed et al. teach a post-treatment shampoo with a pH of 4-6 (column 11, lines 9-13).

Claims 28 & 29: Syed et al. teach including cationic polymers (hair protective agents) in the hair conditioning composition (column 3, lines 35-39).

Claim 30: Syed et al. teach a post-treatment shampoo with a pH of 4-6 (column 11, lines 9-13). A shampoo is an aqueous acid medium and it usually contains a nonionic polymer, cationic polymer, or both.

Claims 31 & 33: Syed et al. teach a kit containing a bleaching composition (claim 22) and further containing a removable affixed (separately packaged) component of a shampoo (claim 26).

Finding of *prima facie* obviousness
Rationale and Motivation (MPEP 2142-2143)

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to combine the hair protectant compositions of Syed et al. with the bleaching composition of Lorenz et al. to improve the hair's post-bleaching condition and produce the instant invention. The skilled artisan would have been motivated to do this because Syed et al. teach that bleaching and coloring hair causes long-term damage to the hair (column 2, lines 23-35); therefore, a protectant would help to reduce the damage. Further, Syed et al. teaches the possible combination of their protectant composition with a bleaching composition (column 18, lines 37-51).

A reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from the teachings. (*In re Opprecht* 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976).

In light of the forgoing discussion, one of ordinary skill in the art would have concluded that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a). Additionally, in light of all the discussed references, there is no indication of unexpected results in the data presented in the instant disclosure.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Conclusion

Claims 1-3, 8-17, 24, 25, 28-31, & 33 are rejected. Claims 4, 18, 19, & 21-23 are withdrawn. No claims allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Christopher R. Lea whose telephone number is (571)270-5870. The examiner can normally be reached on Mon-Thu 7:30-5:00 ET.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on (571)272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

CRL

/Johann R. Richter/
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